No. 17-494

In the Supreme Court of the United States

STATE OF SOUTH DAKOTA,
Petitioner,

–v–

WAYFAIR, INC., OVERSTOCK.COM, INC.,
and NEWEGG, INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF AMICUS CURIAE SOUTH DAKOTA RETAILERS ASSOCIATION IN SUPPORT OF PETITIONER

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MARCH 2, 2018

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INTEREST OF AMICUS CURIAE[1]

The South Dakota Retailers Association ("SDRA") was founded in 1897 as the South Dakota retail Merchants Association. Eighty-five business owners joined together in the summer of that year to draft a constitution and bylaws for the organization. Today, SDRA exceeds 4,000 members and ranks as one of the largest retail associations in the nation. The members of SDRA operate in over 160 categories of business from single location mom and pop businesses with no employees to multi-unit operations with a national and global reach.

The charter members of SDRA agreed that their aim was to improve and increase the business being done by the merchants of South Dakota. Interestingly, membership was not allowed for catalog houses or anyone doing business with catalog houses as such activities were seen at that early date as a challenge to the retail businesses of South Dakota.

Since its founding days SDRA has maintained that the retailers of South Dakota are not afraid of competition but argue it ought to be fair competition. The July 7, 1897, report of the SDRA's Committee on Press stated:

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[1] After timely notification pursuant to Rule 37.2(a), the parties consented to the filing of this brief, and their consent letters are on file with the Clerk. In accordance with Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus, its members, or its counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

> . . . the merchants of this association are not afraid of competition and do not wish the impression to go forth through the Press of the state that they are endeavoring to secure any legislation which will work to the detriment or disadvantage of any class.

In a 1935 preconvention newsletter W.C. Botkin, the Secretary of SDRA at the time, noted that "(t)he small business enterprise is today the most important business unit. It is the backbone of this nation and mainstay of the community, be it large or small . . . "

The issue presented to the Court by the Petitioner is not a new one to SDRA. Continuing the fight for South Dakota retailers in June 1937 the SDRA board resolved:

> . . . in as much as a measure is now before our national congress, which would compel the collection of sales tax by chain stores and mail order houses, without the state in which the consumer lives and compel a remittance of these sales taxes to the federal government with a return to the state of consumer residence; we ask our South Dakota congressional members to work toward enactment of this law, and that they be advised by our Secretary.

Today, "(s)ellers selling merchandise in South Dakota have an obligation to collect and remit sales tax on each transaction to the [South Dakota] Department of Revenue." SDCL § 10-45-27.3 *South Dakota v. Wayfair, Inc.*, 2017 WL 4051554 (SD 2017).

As a result of *Quill Corporation v. North Dakota*, 112 S.Ct. 1904 (1992), an online retailer without a physical presence in the State of South Dakota is not required to collect or remit sales tax from a South Dakota consumer or customer. For the reason of this disparity, SDRA has a substantial interest in the Court's review of the decision below. The economic playing field for the members of SDRA is not level versus our internet brethren. Overturning *Quill* as the Petitioner seeks is an important step to allow for fair competition amongst all businesses selling to South Dakotans.

INTRODUCTION

It should be noted that over 100 online retailers are voluntarily collecting and remitting sales tax on transactions with South Dakota consumers as a result of the 2016 legislation which led to this appeal.[2] *See*, SDCL § 10-64, *et seq.* This voluntary compliance takes away any argument the Respondent would make on the difficulty of such collection and remission.

Online retailers who have sales of under one hundred thousand dollars per year or do not have two hundred or more transactions with South Dakota customers per year do not have to collect and remit

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[2] South Dakota Department of Revenue presentation to the interim joint South Dakota Commerce and Energy Committee, September 27, 2017. www.sdlegislature.gov/docs/interim/2017/documents/DJCE09272017-G.pdf

sales tax. SDCL § 10-64-2.[3] A South Dakota retailer has no break from sales tax collection and remission based on its online sales.

If an internet retailer without a physical presense in the state chooses not to collect and remit sales tax, a South Dakota consumer is required under SDCL § 10-46 *et seq.* to submit and pay use tax for items purchased online. By *Quill* allowing online retailers to avoid the requirement of collecting sales tax from the consumer, a result has been stagnant sales tax growth in the State of South Dakota even as internet commerce continues to increase. Most consumers, frankly, do not know use taxes may be owed with online purchases. *See*, Kelly Phillips Erb., "Tax-Free No More: Amazon to Begin Collecting Sales Tax Nationwide on April 1" FORBES, March 27, 2017.[4] This Court is well aware of

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[3] SDCL § 10-64-2 states: "Certain sellers located outside of state required to collect and remit sales taxes—Criteria. Notwithstanding any other provision of law, any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state, is subject to chapters 10-45 and 10-52, shall remit the sales tax and shall follow all applicable procedures and requirements of law as if the seller had a physical presence in the state, provided the seller meets either of the following criteria in the previous calendar year or the current calendar year: (1) The seller's gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars; or (2) The seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions."

[4] Citing as evidence that use tax payments do not keep pace with sales a 2015 International Council of Shopping Centers

the fact that use tax is often not reported and paid by the consuming public. As Justice Thomas stated, "voluntary compliance with the latter requirement (use tax) is relatively low, leading to a significant loss of tax revenue, especially as internet retailers have increasingly displaced their brick-and-mortar kin." *Direct Market Association v. Brohl*, 135 S.Ct. 1124, 1127 (2015).

In attempting to obtain what is owed as use tax, the State of South Dakota issues a use tax information packet decrying "it's a matter of fairness." *See*, South Dakota Department of Revenue Publication, "Use Tax Everyone's Responsibility", June, 2016.[5] http://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/Tax%20Facts/Use%20Tax%20-%20Everyone's%20Responsibility.pdf.

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poll that found 62% of registered voters were not aware that use taxes were payable with online purchases.

[5] The document states in part, "It's a matter of fairness . . . . With the ease of purchasing over the Internet, online sales have exploded over the years and are increasing every year. Main street businesses, the ones who employ our citizens, pay property tax and support local organizations, are at a 6.5% competitive disadvantage since most out-of-state businesses are not required to pay tax in a state where they have no physical presence. It becomes the purchaser's responsibility to pay the use tax that is due." *Id.*

REASONS FOR PETITIONERS REQUEST OF RELIEF

I. COMPETITIVE DISADVANTAGE

Selling and buying a product in the rural South Dakota marketplace is difficult. South Dakota is a state with a population of 865,454 (2016 estimate)[6] ranking it 46 amongst 50 yet it is 17 amongst 50 in geographical size.[7] With the cost of a good sold in South Dakota subject to the collection of sales tax adding as much as six and one-half percent to the cost of an item versus an identical item sold online, the unfair business advantage of the e-commerce company not collecting and remitting sales tax is obvious. Logic dictates that consumers will buy the less expensive item if they are in fact the same item.[8]

Internet sales nationally, and by logical extension in South Dakota, have continued to grow at a rate much higher than retail industry sales as a whole. *See*, "National Retail Federation estimates 8-12% US e-commerce growth in 2017." BUSINESS INSIDER, Febru-

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[6] US Census Bureau, Annual Estimates of Resident Population for the United States Region, States and Puerto Rico: April 1, 2010 to July 1, 2015.

[7] US Census Bureau, State Area Measurements (2010).

[8] Not surprisingly, in a Pew Research Survey, when asked, 65% of online consumers stated they would make a purchase based on price in looking at a purchase being made online or in a physical store. *See*, "Online Shopping and E-Commerce." PEW RESEARCH CENTER, at 8, December 19, 2016.

ary 10, 2017.[9] According to the US Department of Commerce, e-commerce sales in the second quarter of 2017 increased 16.2% from the second quarter of 2016. *See*, US Department of Commerce Quarterly Retail E-Commerce Sales, August 17, 2017. Total retail sales increased only 4.1% in the same period. *Id.* In a recent survey by Deloitte, LLP, consumers in 2017 for the first time expected the majority of their holiday spending to occur online. *See*, Deloitte, LLP, 2017 Holiday Survey, at 17, October 24, 2017.

The PEW RESEARCH CENTER, in a June 2000 survey, reported that 22% of Americans indicated they had purchased items online. By 2016 that number had risen to 79% of Americans. PEW RESEARCH CENTER, December 19, 2016, Online Shopping and E-Commerce, at 5. Strikingly, 90% of 18 to 29-year old's buy items online with 77% of them having used their phones to do so. PEW RESEARCH CENTER, December 19, 2016, Online Shopping and E-Commerce, at 6.

Justice Kennedy recognized in his concurrence in *Brohl*, that there is an "unfairness to local retailers and their customers who do not pay taxes at the registers" as a result of e-commerce transactions not subject to point of sales tax collection. *Brohl*, Kennedy concurring at 1135. This avoidance of tax collection in the e-commerce sphere, the outgrowth of *Quill*, causes, "extreme harm and unfairness to the States." *Brohl*, Kennedy concurring at 1134.

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[9] Citing the National Retail Federation, which expects online retail to grow 8-12% for 2017, which may be up to three times higher than the retail industry in general.

The impact on the ability to sell an item at a competitive advantage due to a lack of sales tax was shown by a recent Ohio State University study analyzing the impact of what it termed the "Amazon tax". Brian Baugh, et al., "Can Taxes Shape an Industry? Evidence from The Implementation of the 'Amazon Tax'" OHIO STATE UNIVERSITY. FISHER COLLEGE OF BUSINESS, January 2018. The survey looked at Amazon purchasing trends done in states in 2012 through 2014 when states began imposing sales tax on sales through Amazon's website due to the company having a physical presence in those 19 states. The study concluded that the imposition of a sales tax on those Amazon transactions made Amazon products less competitive. *Id.* at 7, 23. Looking at transaction data, based on over 275,000 households, the study concludes that Amazon sales fell in the study by 9.4% after implementation of what it termed the Amazon tax. *Id.* at 24. This effect was greater among large purchases in excess of $250.00 which saw a drop of 29.1% after implementation of the Amazon tax. *Id.* Interestingly, the survey did find a sales increase in competitors such as Newegg, who did not collect and remit sales tax, and which saw an average increase in its sales of 13%. *Id.* at 4.

Local retailers are the life blood and bedrock of the communities they serve. Moreover, they provide donations of money and goods for the 4-H rodeo, little league teams, individuals or families with catastrophic needs, and the volunteer fire department just to name a few. Brick and mortar retailers refer to it as sidewalk rent. Remote sellers do not experience this. They are truly remote in every sense of the word. These online-only retailers are removed from the communities they

sell goods into. The disconnect is large: *Wayfair*, Overstock, Newegg and their ilk reap the benefits of sales in these communities but have none of the community responsibility held by brick and mortar. This is a sentiment SDRA has maintained since its founding. In a May 9, 1935 letter from Floyd B. Johnson, President of Johnson & Company, and published in the SDRA's June 1935 preconvention newsletter, he stated:

> Picture, if you please, a good thriving small town in South Dakota, and what you will find—a local bakery, shoe store, men's and boy's clothing store, ladies' dry goods and ready to wear store, several grocery stores, a millinery shop, etc., etc. Every one doing business with his friend or neighbor and at a profit. The result is good business, good schools, good streets, and good future for the whole community. On the other hand, suppose you bought your bread out of town and your merchandise from the catalogues of chain affiliates, penitentiaries, or the East, and your customers bought their goods from chain stores and mail order houses. Perfection in this would result in no business, poor schools, streets, and no future or opportunity for any in the whole community.

The very jobs that retailers create in South Dakota face the competitive disadvantage our businesses deal with in the *Quill* environment. Lower sales due to an unfair tax advantage can only translate to fewer small businesses in South Dakota and therefore fewer jobs available, as well as fewer dollars for civic and charitable projects.

II. WEAKNESS IN SALES TAX REVENUES

A weakness in the growth of sales tax revenues has forced the regulatory authorities in the State of South Dakota to increase their audit activities and efforts at collecting sales and use taxes. With slowing sales tax revenues, the State necessarily must step up its enforcement efforts of businesses that it can regulate and audit to seek out taxes that have not been remitted and may be owed to the State of South Dakota. *See*, Letter to the Department of Revenue from the South Dakota Government Operations and Audit Committee interim meeting, Tuesday, August 29th, 2017. http://sdlegislature.gov/docs/interim/2017/documents/goa8-29-17letter-torevenuedoc2.pdf. Such efforts bring additional audit risks and costs for SDRA members. Such risks and costs are avoided by online sellers due to *Quill*.

For the fiscal years 2014, 2015 and 2016, the State of South Dakota saw a year over year average increase in sales tax revenues of 1.80 percent.[10] What is interesting in these statistics is that the retail trade industry in South Dakota represents approximately 38% of the reporting filers in the fiscal year ending 2016. But that 38% represents a disproportionately large 52.66% of the taxable sales. *Id.* at 180.

This experience in South Dakota, as witnessed in sales tax collections, clearly does not meet with or

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[10] *See*, South Dakota Comprehensive Annual Financial Report for fiscal year ending June 30, 2016, at 176. For the year ending June 30, 2014 sales tax revenues were $858,001,000. For the year ending June 30, 2015, they were $871,402,000. For 2016 they were $905,475,000.

coincide with the continued online sales growth. *See* above at 6. Rather, it clearly points to the problem of tax receipts not capturing the growth in internet sales.

Andy Gerlach, the current Secretary of Revenue in the State of South Dakota, acknowledging the problem stated, "Obviously e-commerce is becoming more important every day . . . you see the stores that have closed or downsized . . . if you can't tax e-commerce, it is going to continue to erode the taxes your state is going to take in. We need a tax policy that keeps up with that." Elain S. Povich "With Online Sales Booming, State Struggle to Capture Sales Tax." *The Pew Charitable Trusts-Stateline*, May 22, 2017.

The South Dakota Supreme Court recognized that "South Dakota has no state income tax and relies on retail sales and use tax for much of its revenue . . . (and) (a)s internet sales by these sellers (e-commerce) have risen, state revenues have decreased." *South Dakota v. Wayfair*, 2017 WL 4051554 (SD 2017). The South Dakota Legislature found in 2016 that:

> The inability to effectively collect the sales or use tax from remote sellers who deliver tangible personal property, products transferred electronically, or services directly into South Dakota is seriously eroding the sales tax base of this state, causing revenue losses and imminent harm to this state through the loss of critical funding for state and local services;[11] (t)he harm from the loss of revenue is especially grievous in South Dakota because the State has no income tax, and

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[11] SDCL § 10-64-1(1).

> sales and use tax revenues are essential in funding state and local services;[12] and (t)he structural advantages of remote sellers, including the absence of point-of-sale tax collection, along with the general growth of online retail, make clear that further erosion of this state's sales tax base is likely in the near future.[13]

The South Dakota Legislature further stated that "whereas, this act (SD Senate Bill 106) is necessary for the support of the State government and its existing public institutions, an emergency is hereby declared to exist."[14]

Again, this out flight of unattainable tax revenue due to the increase of e-commerce sales has, as was pointed out by Justice Kennedy, hurt the states. "*Quill* now harms states to a degree far greater than could have been anticipated earlier." *Brohl*, Kennedy concurring at 1135.

As is often the case, your argument is sometimes best made by your opponent. In a press release opposing the market place fairness act, an effort to bring legislation overturning the physical presence requirement found in *Quill*, the National Taxpayers Union ("NTU") stated that for the ten years following 2015, the implementation of such legislation could amount to $340 Billion in additional taxes collected. Douglas Kellogg. NTU press release, October 31, 2014. In a

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[12] SDCL § 10-64-1(2).

[13] SDCL § 10-64-1(4).

[14] South Dakota SL, 2016, Chapter 70, Section 9, eff. May 1, 2016.

similar release by NTU in June of 2015, the Executive Vice President of NTU commented that consumers would be required, if similar legislation passed, to pay "hundreds of billions of dollars in additional sales tax . . ." Douglas Kellogg. NTU press release, June 15, 2015. Obviously, these additional taxes are simply the amounts that should be captured by use tax and are due and owing the states where the consumers live, work and buy products online. These revenues (taxes) escape collection at the State level due to *Quill's* physical presence test. It is time for that to change.

CONCLUSION

For these reasons, and those stated by the Petitioner, SDRA urges the Court to grant the relief requested by the Petitioner and overturn *Quill.*

Respectfully submitted,

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MARCH 2, 2018